STATE OF MICHIGAN

COURT OF APPEALS

LITTLE CAESAR ENTERPRISES, INC.,

Plaintiff-Appellant,

v

ROBERT ROOYAKKER, A & T HOLDINGS, INC., R & K HOLDINGS, INC., JEAN ROOYAKKER, and A & R HOSPITALITY, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
July 7, 2009

No. 283810
Charlevoix Circuit Court
LC No. 06-038921-CK

Before: Zahra, P.J., and Whitbeck and M.J. Kelly, JJ.

PER CURIAM.

In this contract dispute, the trial court dismissed the claim of Little Caesar Enterprises, Inc. (Little Caesar) against defendant A & R Hospitality, L.L.C. (A & R Hospitality) pursuant to an order of summary disposition under MCR 2.116(C)(10), and dismissed Little Caesar's claims against the remaining defendants, Robert Rooyakker, A & T Holdings, Inc. (A & T Holdings), R & K Holdings, Inc. (R & K Holdings), and Jean Rooyakker (collectively, the Rooyakker defendants), pursuant to a judgment of no cause of action following a bench trial. The trial court also awarded A & T Holdings, R & K Holdings, and Jean Rooyakker attorney fees of $32,621.73 and costs of $972.05. Little Caesar appeals as of right. We affirm the trial court's decision granting summary disposition in favor of A & R Hospitality, but vacate the judgment of no cause of action with respect to the Rooyakker defendants and remand for further proceedings.

I. Basic Facts And Procedural History

At the times pertinent to this case, Robert Rooyakker and his wife Jean Rooyakker both had interests in R & K Holdings and A & T Holdings. On behalf of R & K Holdings, they executed a franchise agreement with Little Caesar, effective January 1, 2002, to operate a Little Caesar restaurant in Grayling. They also executed similar franchise agreements on behalf of A & T Holdings to operate Little Caesar restaurants in Gaylord and five other locations. They also executed a guarantee for each franchise agreement. Section 15.3 of each franchise agreement contained a noncompetition covenant for a specified time period in the event the agreement was terminated, regardless of the reason for termination. Specifically, the covenant provided, in part:

> Franchisee shall not, during the time frame and in the geographic area described below, without Little Caesar's prior written consent, either directly or

> indirectly, for itself or through, on behalf of, or in conjunction with any person, persons, or legal entity, own, maintain, advise, operate, engage in, be employed by, make loans to, or have any interest in or relationship or association with a business which is a quick or fast service restaurant primarily engaged in the sale of pizza, pasta, sandwiches, and/or related products. The prohibitions set forth in this Section 15.3 shall apply: . . . (ii) for a continuous uninterrupted two year period with respect to the Designated Market Area in which Franchisee's Restaurant was located.

In February 2005, Little Caesar took steps to terminate the franchise agreements and brought a federal lawsuit against Robert Rooyakker, A & T Holdings, and R & K Holdings. (This dispute stemmed from the Rooyakkers' decision to use a spice blend not authorized by Little Caesar). The federal action was settled pursuant to an agreement, requiring that the restaurants in Grayling and Gaylord be "de-identified" as Little Caesar restaurants by September 3, 2005, and that the other five restaurants be sold. With respect to post-termination obligations, paragraph 2(i) of the settlement agreement provided, in part:

> The Rooyakker Parties [Robert, A & T Holdings, and R & K Holdings] shall comply with all post-termination obligations of the franchise agreements. A restaurant which sells and advertises (offsite and onsite, including the menu), steaks, salads, pasties and desserts does not violate the post-termination non-competition provision (¶ 15.3) of the franchise agreements if it also offers pizza, pasta and sandwiches, as long as pizza, pasta, and sandwiches are not advertised or marketed as the primary or dominant items, and do not comprise the primary or dominant items, and as long as "pizza" is not the in the store name, logo, or service mark.

In the latter part of 2005, Jean and Robert Rooyakker's son, Matthew Rooyakker, formed A & R Hospitality, and A & T Holdings then sold the other five restaurants to A & R Hospitality. All of the sold restaurants, along with A & T Holdings's restaurant in Gaylord, and R & K Holdings's restaurant in Grayling, were operated under the name, "Spicy Bob's Italian Express."

In August 2006, Irwin Alterman, an attorney for Little Caesar, went to the Grayling Spicy Bob's Italian Express. At that time, he took several photographs of signs and posters depicting pizza advertisements. Perhaps as a result, in September 2006, Little Caesar filed this action, seeking both injunctive relief and money damages arising from alleged breaches of the franchise agreements, the settlement agreement, and the guarantees executed by Robert and Jean Rooyakker. More specifically, Little Caesar's claim was based on the Rooyakker defendants alleged interest in or relationship with the Spicy Bob's restaurant chain, which allegedly advertised and sold pizza, pasta, and sandwiches as predominant or dominant menu items.

A & R Hospitality moved for summary disposition under MCR 2.116(C)(10). A & R Hospitality conceded that it had purchased the five former Little Caesar restaurants in locations other than Gaylord or Grayling. But A & R Hospitality argued that it was not a party to the settlement agreement and was not bound by its terms. Little Caesar opposed summary disposition on the ground that a genuine issue of material fact existed whether the sale to A & R Hospitality was a sham by Robert and Jean Rooyakker to avoid their obligations under the

franchise and settlement agreements. After hearing oral arguments, the trial court found no genuine issue of material fact with respect to A & R Hospitality's liability and, therefore, granted its motion. More specifically, the trial court found that "[u]nder the Sale of Assets Agreement, A & R acquired the assets of the so-called Rooyakker parties. It did not receive a transfer of property or powers from A & T or Mr. Rooyakker."

A bench trial regarding Little Caesar's claims against the Rooyakker defendants was conducted in October 2007. At the time of trial, the two-year period for the noncompetition covenant in the franchise agreements had expired, unless the trial court fashioned a remedy to extend it.

Irwin Alterman, an attorney for Little Caesar, testified that Little Caesar is engaged in the "quick service food business" and that its business primarily specializes in pizza. Alterman testified that during negotiations for the settlement agreement, Robert Rooyakker stated that he might not sell the Grayling and Gaylord restaurants, but rather would keep them to pursue a "whole different concept" involving a sit-down restaurant. Although Robert Rooyakker proposed a "whole different menu," he wanted to continue selling pizza because he believed that it would be difficult for the business to survive without pizza sales. They refined the type of advertising that would not violate the noncompetition covenant during the negotiations such as to use the word "dominant" to reinforce the concept that pizza, pasta, and sandwiches would not be advertised or marketed as the primary items. An additional restriction, apart from advertising, provided that pizza, pasta, and sandwiches would not comprise primary or dominant items. Alterman testified that the focus of this restriction was on the performance of the restaurants. According to Alterman, the case here was filed after it was concluded that the restaurants in Grayling and Gaylord remained pizza stores, after their de-identification, under any standard.

Robert Rooyakker testified that he wanted to divorce himself from Little Caesar after the dispute arose concerning the spice blend, even though he thought that he could prevail in the federal action by curing his failure to use an approved vendor. He disposed of five restaurants after his son Matthew Rooyakker, Matthew's wife, and Nicholas Aune, an individual with experience in the restaurant business, entered into an operating agreement with respect to A & R Hospitality. One of those restaurants is now closed.

Robert Rooyakker testified that he made it clear to Alterman during the settlement negotiations in the federal action that he planned to keep the restaurants in Gaylord and Grayling and that he had to continue selling pizza. He was interested in continuing to sell "grinders," but did not consider grinders to be sandwiches at the time of the settlement negotiations because Little Caesar did not sell grinders. He understood that a menu from the restaurant in Grayling describes a grinder as an oven-baked sandwich. He also thought that some of Little Caesar's restaurants probably sold submarine sandwiches. Robert Rooyakker also testified that he made it clear to Alterman during negotiations that he could not be limited to any percentages regarding how much pizza, pasta, and sandwiches were sold, because he could not control what people buy. Robert Rooyakker's position was that he would not strictly market pizza. He thought that the entire marketing program would be considered in determining if pizza, pasta, and sandwiches are marketed or advertised as primary or dominant items. He thought that it would be sufficient if he stayed within the spirit of the agreement. Robert Rooyakker opined that the efforts to advertise products other than pizza caused a reduction in sales.

With respect to the Grayling location, Robert Rooyakker testified that he de-identified the restaurant by removing one "pizza" word from the phrase "pizza-pizza" on a decorative wall. He then added some posters that he thought would be fitting and attractive for an Italian restaurant. The dining area consists of approximately seven tables. He did not believe that the exterior looked like a "pizza house." With respect to the Gaylord location, Robert Rooyakker testified that it had a different format compared to its operation as a Little Caesars restaurant, because it was not strictly a carryout business. It had a liquor license, full menu, and sit-down service. The property on which the restaurant was located was later sold. In October 2006, the restaurant was moved to a new location. During negotiations with Alterman, Robert Rooyakker had thought about creating a sports restaurant at the location, but he did not have sufficient area to do so. Robert Rooyakker testified that he nonetheless established a substantially expanded menu. He continued to sell beer and wine.

Matthew Rooyakker testified that A & R Hospitality owned four Spicy Bob's restaurants; the fifth restaurant was closed. He testified that the restaurants predominantly sold pizza, pasta, and sandwiches.

Following the close of proofs, Little Caesar's attorney asserted in closing argument that the Rooyakker defendants should be enjoined for two years from advertising or marketing pizza, pasta, and sandwiches as the primary and dominant items at the Gaylord and Grayling locations, but did not seek to enjoin sales. Little Caesar sought monetary damages in the form of royalties for the Gaylord and Grayling restaurants, and the other five restaurants sold to A & R Hospitality. Little Caesar also sought an award of attorney fees.

In a written opinion, the trial court found that Little Caesar had no cause of action. More specifically, the trial court found the Rooyakker defendants did not violate the agreement by selling grinders because "the grinders were not contemplated in the agreement limiting the sale of sandwiches." The trial court further concluded that the agreement was not violated even though the sale of pizza consisted of over 50 percent of sales. According to the court, the parties had acknowledged during negotiations that the percentage of pizza sales could not be limited because defendants could not control their customers' demand. The trial court found that defendants made a good faith effort to comply with the settlement agreement by not holding the restaurants out as "pizza stores" and by not having pizza, pasta, and sandwiches as the "primary or dominant" items available. Although the court did find two minor, nonrecurring deviations from the contractual terms (in one instance pizza was emphasized in a Gaylord Visitors Guide, and the other was in a website prepared by a child for Matthew Rooyakker's company), it found no material breach with respect to the promotion and sale of items at the Gaylord and Grayling locations. Further, the trial court found no deviation from the contractual terms arising from the sale of the other five restaurants to Matthew Rooyakker. Accordingly, the trial court ordered entry of judgment for no cause of action.

II. Judgment Of No Cause Of Action

A. Standard Of Review

Little Caesar challenges the trial court's judgment of no cause of action with respect to its claims against the Rooyakker defendants. Little Caesar seeks to have this Court hold that these defendants violated the franchise and settlement agreements and remand the case to the trial

court to determine the appropriate remedy. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo."[1] "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[2] We give deference to the trial court's special opportunity to judge the credibility of witnesses who appear before it.[3] We also review de novo the interpretation of a contract, including whether a contract is ambiguous.[4]

B. Governing Terms

Turning first to Little Caesar's arguments regarding breach of the noncompetition covenant in § 15.3 of the franchise agreements for the Grayling and Gaylord locations, as modified by the settlement agreement, we agree that the two agreements must be read together.[5]

Under the parol evidence rule, evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary a written contract, are not admissible to vary the terms of a contract that is clear and unambiguous.[6] A prerequisite to applying this rule is that the parties intended the written contract to be a complete expression of their agreement of the matters covered.[7] Here, the franchise agreement and the settlement agreement contain express integration clauses. Therefore, to avoid the parol evidence rule, some exception, such as a patent ambiguity or an external fact demonstrating a latent ambiguity, must be shown.[8] Also, the existence of an integration clause does not preclude the trial court from supplying details concerning the parties' performance. "So long as the essentials [of a contract] are defined by the parties themselves, the law supplies the missing details by construction."[9]

C. Materiality Of Breach

There is merit to Little Caesar's argument that the trial court committed an error of law by evaluating the materiality of any breach to determine if it had a cause of action for breach

---

[1] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[2] *Id.*

[3] MCR 2.613(C).

[4] *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

[5] *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998) ("Where one writing references another instrument for additional contract terms, the two writings should be read together.").

[6] *Hamade v Sunoco, Inc*, 271 Mich App 145, 166-167; 721 NW2d 233 (2006).

[7] *Id.* at 167.

[8] *In re Woodworth Trust*, 196 Mich App 326, 328; 492 NW2d 818 (1992); see also *Zurich Ins Co v CCR & Co* (*On Rehearing*), 226 Mich App 599, 606; 576 NW2d 392 (1997).

[9] *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941); see also *Walter Toebe & Co v Dep't of State Hwys*, 144 Mich App 21, 31; 373 NW2d 233 (1985), and *J W Knapp Co v Sinas*, 19 Mich App 427; 432; 172 NW2d 867 (1969).

against either R & K Holdings or A & T Holdings. The trial court's reliance on *Walker & Co v Harrison*,[10] is misplaced because, unlike in *Walker & Co*, Little Caesar was not here seeking to repudiate the contract, but rather seeking monetary damages, including contractual attorney fees, and equitable relief to prohibit defendants from advertising or marketing pizza, pasta, and sandwiches as primary or dominant items at the Gaylord and Grayling locations for two years. "When performance of a duty under a contract is due any non-performance is a breach."[11]

Materiality of breach is still relevant, however, in light of the particular equitable relief that Little Caesar sought in the form of an extension of the two-year noncompetition covenant, which expired in September 2007.[12] Therefore, while the trial court here erred in the sense that it considered the materiality of any breach, the court's mere consideration of materiality was inadequate to warrant reversal.[13] Rather, we conclude that the more significant issue that Little Caesar raises on appeal concerns whether the trial court misinterpreted the noncompetition covenant, as modified by the settlement agreement, as one that should be evaluated under good-faith standards.

D. Good Faith And The Trial Court's Findings

In this case, the trial court appropriately found that the noncompetition covenant included an obligation to act in good faith, inasmuch as "[i]t has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract 'that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'"[14] We further note that where a contract calls for a party to determine the manner of its performance as a matter of discretion, a court will imply that the discretion must be exercised in good faith.[15]

Here, however, the relevant performance due Little Caesar by the franchisees does not require an exercise of discretion. According to the face of the franchise agreements, the noncompetition covenant in § 15.3 applied when the business was "a quick or fast service restaurant primarily engaged in the sale of pizza, pasta, sandwiches, and/or related products." Thus, those types of restaurants were not permitted to operate in the restricted areas for a two-year period if they were "primarily engaged in the sale of pizza, pasta, sandwiches and/or related

---

[10] *Walker & Co v Harrison*, 347 Mich 630; 81 NW2d 352 (1957).

[11] *Woody v Tamer*, 158 Mich App 764, 771; 405 NW2d 213 (1987), quoting 2 Restatement Contracts, 2d, § 235, p 211.

[12] See *Thermatool Corp v Borzym*, 227 Mich App 366, 377-378; 575 NW2d 334 (1998) (extension of a covenant not to complete may be appropriate where there is "continuous and systematic activity in violation of the agreement").

[13] MCR 2.613(A) (an error in a ruling by the trial court is not a ground for disturbing a judgment unless refusal to take such action appears inconsistent with substantial justice).

[14] *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151; 483 NW2d 652 (1992), quoting *Fortune v Nat'l Cash Register Co*, 373 Mass 96, 104; 364 NE2d 1251 (1977).

[15] *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975).

products." Because the word "primarily" is not defined in the contract, it is appropriate to consider the dictionary definition of this term.[16] "Primarily" is defined in *Random House Webster's College Dictionary* (1997), p 1034, as "essentially; chiefly." Therefore, applying the plain and ordinary meaning of the word, the restricted items could not be the chief items sold at the restaurants. Although a question of fact may arise whether the covenant was violated, it provides an objective, not discretionary, standard of performance.

The settlement agreement itself also provides objective standards of performance. According to its terms, the settlement agreement applied when the business "sells and advertises (offsite and onsite, including the menu), steaks, salads, pasties and desserts." The settlement agreement provides that if this condition is satisfied, the restaurant does not violate the post-termination provision of the franchise agreement,

> if it also offers pizza, pasta and sandwiches, *as long as* pizza, pasta, and sandwiches are not advertised or marketed as the primary or dominant items, and do not comprise the primary or dominant items, and *as long as* "pizza" is not in the store name, logo, or service mark. [Emphasis added.]

The phrase "as long as" means, in pertinent part, "provided that."[17] Examined in context, the phrase in this case signals two limitations on a restaurant's ability to offer pizza, pasta, and sandwiches. As relevant here, the limitation requires that "pizza, pasta, and sandwiches are not advertised or marketed as the primary or dominant items, *and* do not comprise the primary or dominant items" (emphasis added). In light of the use of the word "and" between "advertised or marketed" and "comprise," we find merit to Little Caesar's argument that this limitation establishes two requirements that must be satisfied for a restaurant to offer pizza, pasta, and sandwiches without violating the noncompetition covenant. But we do not agree that the failure to satisfy either requirement constitutes a violation. This interpretation would require that "and" be treated as "or" before the "comprise" requirement. Because the use of the word "and" does not render the meaning dubious, we apply it as written.[18] Therefore, both requirements must objectively fail for a restaurant offering pizza, pasta, and sandwiches to avoid violating the noncompetition provision in the franchise agreement.

Of greater significance, we conclude that the trial court erred in applying a good-faith standard to the "advertising or marketing" requirement that must also exist for the franchisee to take advantage of the provision in the settlement agreement. The settlement agreement does not give discretion to franchisees to determine if restricted items are advertised or marketed as "primary or dominant items." Any wrong suffered by Little Caesar is the same, regardless of whether there was bad faith.[19] Because the breach of duty in this case can be determined under

---

[16] *Morley v Automobile Club of Mich*, 458 Mich 459, 470; 581 NW2d 237 (1998).

[17] *Random House Webster's College Dictionary* (1997), p 774.

[18] *Auto-Owners Ins Co*, *supra* at 50-51.

[19] See *Stockdale v Jamison*, 416 Mich 217, 225; 330 NW2d 389 (1982), overruled in part on other grounds by *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525; 447 NW2d 691 (1989), mod 436 Mich 372 (1990).

the objective "primary or dominant" standard required by the contract, good faith is not a defense to Little Caesar's breach of contract action.[20] Therefore, the trial court erred in evaluating performance under a good-faith standard.

Examined in context, we also conclude that the "do not comprise the primary or dominant items" requirement could not reasonably apply to advertising or marketing efforts, because this would render it duplicative of the conjunctive requirement "are not advertised or marketed as the primary or dominant items." Considering that the provision as a whole is predicated on the restaurant engaging in sales and advertising activities and that the noncompetition covenant in the franchise agreement is concerned with sales activity, it is logical to conclude that the "comprise" requirement is predicated on sales. Therefore, to the extent that the trial court indicated in its findings that the appropriate consideration was the primary or dominant items *available* in restaurants, without consideration of actual sales activity, we conclude that its decision is contrary to the unambiguous language of the agreements.

Construing the agreements as a whole, and giving effect to each word to the extent possible,[21] the only apparent ambiguity relates to how sales are to be measured. The contractual standard is that pizza, pasta, and sandwiches not comprise the "primary or dominant items." "Primary" means "first in rank or importance; chief"[22] The alternative standard, "dominant," is similar because it means, in pertinent part, "predominant; chief or foremost."[23] Neither standard indicates whether the appropriate measure is to be based on sales revenues, the number of items sold, or possibly both considerations. Therefore, a court may supply the missing details for measuring sales by construction.[24]

Nonetheless, it is apparent here from the trial evidence that the measure of sales is not a material issue because, regardless of which standard is applied, there was evidence that pizza, pasta, and sandwiches were the primary or dominant items. Indeed, the trial court observed that it was undisputed that pizza sales comprised over 50 percent of gross sales. And we do agree that the trial court clearly erred in failing to treat grinders as sandwiches within the meaning of the agreements. A "sandwich" is commonly understood as "two or more slices of bread or the like with a layer of meat, fish, cheese, etc., between them."[25] Indeed, each restaurant's menu described a grinder as an "oven-baked sandwich." Robert Rooyakker's testimony that grinders were not sold at Little Caesar's other franchise locations and that he was able to open a business near a Subway restaurant does not create any latent ambiguity bearing on the parties' intent.[26] Neither the original franchise agreement nor the settlement agreement limits the word

---

[20] *Stockdale*, *supra* at 224.

[21] *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 197; 760 NW2d 624 (2008).

[22] *Random House Webster's College Dictionary* (1997), p 1034.

[23] *Id.*, p 388.

[24] *Nichols*, *supra* at 159.

[25] *Random House Webster's College Dictionary* (1997), p 1147.

[26] *In re Woodworth Trust*, *supra* at 328.

"sandwich" in the noncompetition covenant to specific types of sandwiches. Pizza, pasta, and sandwiches are all restricted items, regardless of the particular type of pizza, pasta, and sandwich involved. Therefore, based on the unambiguous language of the contract, the trial court clearly erred in finding that while a grinder is "technically" a sandwich, it was not contemplated in the provision limiting sales of sandwiches.

However, we are unable to conclude as a matter of law that Little Caesar proved the necessary breach of contract to warrant a remedy against any of the four defendants. This Court's role is not to find facts, but rather to review the trial court's decision.[27] Thus, remand is appropriate in this case because the trial court incorrectly applied the law and there exist factual disputes relative to Little Caesar's claim.

More specifically, with respect to the Spicy Bob's restaurant operated by R & K Holdings in Grayling, we hold only that the undisputed evidence that steaks were not sold as part of the product mix at this restaurant renders inapplicable the modification established by the settlement agreement for a "restaurant which sells and advertises . . . steaks, salads, pasties and desserts." Therefore, the noncompetition covenant in the original franchise agreement that precludes a "quick or fast service restaurant" from primarily engaging in the "sale of pizza, pasta, sandwiches, and/or related products" applies. The issue of breach must be evaluated without regard to whether R & K Holdings acted in good faith. Accordingly, we vacate the judgment of no cause of action based on the noncompetition clause, including the award of contractual attorney fees based on that judgment, and remand this case for further factual findings regarding this claim consistent with this opinion. We express no opinion regarding whether Jean or Robert Rooyakker could be held liable for any breach, our review being limited to the *franchisee's*, not the *guarantor's*, contractual duties.

With regard to the Spicy Bob's restaurant operated by A & T Holdings in Gaylord, there was evidence that steaks were part of the product mix; therefore, the provision of the settlement agreement would apply, and we remand for further findings regarding the parties' claim consistent with this opinion. We note that, while the parties agree that all advertising and marketing efforts, and not one stand-alone advertisement, should be considered in determining whether the noncompetition covenant, as modified by the settlement agreement, was breached, Little Caesar's original complaint was filed in September 2006, in the midst of the two-year term of the covenant. Taken to the extreme, consideration of the entire advertising or marketing effort suggests that Little Caesar's lawsuit was filed prematurely in September 2006 because the two-year period for the noncompetition covenant did not expire until September 2007, absent an anticipatory breach of contract. "Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance."[28] However, it is apparent that the contract imposes continuing duties on A & T Holdings to comply with the noncompetition covenant that could be breached at any point during the two-year period beginning on September 3, 2005. "[I]n a case

---

[27] *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34 n 12; 609 NW2d 567 (2000).

[28] *Stoddard v Manufacturers Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999).

involving a continuing or recurrent wrong, the Little Caesar is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course."[29]

Because the contract imposes continuing duties on A & T Holdings that could be breached at any time during the two-year period beginning on September 3, 2005, we conclude that Little Caesar was free to attempt to establish a breach at any particular time relevant to its complaint. Any concerns regarding the time period for evaluating advertising or marketing efforts may be addressed by judicially imposing a reasonable time.[30] We leave it to the trial court to determine on remand the appropriate time period for evaluating whether Little Caesar can prevail in establishing its breach of contract claim against A & T Holdings. As with Little Caesar's claim against R & K Holdings, we vacate the judgment of no cause of action based on the noncompetition covenant, including the contractual award of attorney fees based on that judgment, and remand for further proceedings consistent with this opinion. We express no opinion regarding whether Jean or Robert Rooyakker could be held liable for any breach.

E. Restriction On Relationship With Another Restaurant

Little Caesar also argues that the Rooyakker defendants breached the restrictive covenant when it sold the other five restaurants to A & R Hospitality because the evidence showed that the Rooyakker defendants made loans to or had a "relationship or association" with the sold stores.

We find merit to Little Caesar's argument that the trial court erred in finding no cause of action with respect to the provision in § 15.3 of the franchise agreement that precludes a former franchisee from making loans to another restaurant business, but conclude that Little Caesar has only established error with respect to A & T Holdings, as the former franchisee of the other five restaurants sold to A & R Hospitality. Section 15.3 plainly precluded the franchisee (here, A & T Holdings), from directly or indirectly, from making "loans to, or having an interest in or relationship with a business which is a quick or fast service restaurant." Again, we express no opinion regarding Jean or Robert Rooyakker's potential liability as *guarantors* for the breach of contract related to the sales agreement, our review being limited to the *franchisee's* duties in § 15.3 of the franchise agreement that were raised by Little Caesar. And because Little Caesar does not explain why § 15.3 should apply to R & K Holdings, we do not address its liability either.[31]

Little Caesar's counsel argued at trial that the financial terms of A & T Holding's sale to A & R Hospitality established a loan, contrary to § 15.3. The trial court rejected this argument. It stated in part:

---

[29] Restatement Judgments 2d, § 26(1)(e); see also *Plaza Investment Co v Abel*, 8 Mich App 19, 27; 153 NW2d 379 (1967) (because covenant to repair was capable of constant or continuous breach, a second lawsuit seeking damages after the first recovery was not precluded).

[30] See *Nichols, supra* at 159; *Walter Toebe & Co, supra* at 31.

[31] *Mitcham, supra* at 203 (stating that the appellant must "adequately prime the pump" to invoke appellate review).

> The court does not find a violation of any agreement. Granted it was sale to a family member and included favorable terms. There is no prohibition against that. Robert Rooyakker did guarantee the down payment to the bank. The agreements do not prohibit that. The plaintiff attempts to categorize the remainder of the purchase as a loan to a competitor which is prohibited by the franchise agreement. However, it is legally an installment sales agreement not a loan. It is not considered as such by the Internal Revenue Service according to testimony.

With respect to the balance owed by A & R Hospitality to A & T Holdings, the sale of assets agreement contained "installment" language in ¶ 2.1:

> [T]he balance of the Purchase Price shall be paid in equal Monthly Installments of Three Thousand ($3,000.00) Dollars each at an annual percentage rate of 6% without deduction or offset of any kind. The entire unpaid balance of the Purchase Price shall be paid no later than October 31, 2015.

According to Matthew Rooyakker's testimony, A & T Holdings reported the transaction to the Internal Revenue Service on form 1120 as an installment sales contract, not a loan. But the transaction is shown on A & T Holdings' "books" as a note receivable, with "income tax or taxable income as it receives payment against that."

Although there was evidence that the Internal Revenue Service treated the transaction as an installment sales contract, this technical definition for tax purposes is not controlling. In general, the words in a contract are given their plain and ordinary meaning.[32] But parol evidence is permitted to explain technical terms:

> Parol evidence is always receivable to define and explain the meaning of words or phrases in a written instrument which are technical and not commonly known, or which have two meanings—the one common and universal and the other technical. Similarly, where a new and unusual word or phrase is used in a written instrument, or where a word or phrase is used in a peculiar sense as applicable to a particular trade, business, or calling or to any particular class of people, it is proper to receive extrinsic evidence to explain or illustrate the meaning of that word or phrase. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of trade into the ordinary language of the people generally. Under this rule, parol evidence is admissible to show that apparently ambiguous statements of description and price have a recognized meaning in the trade or business to which the contract relates.
>
> "A well-recognized technical meaning of a term does not necessarily preclude oral evidence of an intended or understood modified meaning, where the

[32] *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

> circumstances and language in connection with which it is used tend to obscure it and leave in doubt the light in which the parties to the agreement regarded it."[33]

Here, the word "loan" in the franchise agreement's noncompetition covenant is not defined in accordance with any technical tax consequences of the transaction. Further, there was no evidence that the word "loan" has any peculiar meaning for franchise transactions that is associated with tax laws. Absent such evidence, the trial court should have applied the plain and ordinary meaning of the language. It should have looked to the substance of the sale of assets agreement, and not how it might be treated for tax purposes, in determining whether it was a "loan," directly or indirectly, within the meaning of the franchise agreement.

A "loan" is commonly understood to occur when there is an advance of money, with an obligation to repay.[34] "The party receiving the advance of money or property must be bound to repay it at some future time."[35] By comparison, a *sale* consists of the passing of title for a price.[36] The Michigan Supreme Court in *Twichel v MIC Gen Ins Corp*,[37] explained the meaning of an "installment sales contract" when considering an issue of statutory construction:

> The phrase "installment sale contract" does not require a writing; nor does it require a sale at retail. *Merriam Webster's Collegiate Dictionary* (10th ed) provides a typical definition of the term "installment": "One of the parts into which a debt is divided when payment is made at intervals." Moreover, Black's Law Dictionary (7th ed) defines the more specific term "installment contract" as "[a] contract requiring or authorizing the delivery of goods in separate lots, *or payments in separate increments, to be separately accepted.*" Thus, there is no material difference whether the term is accorded its commonly understood meaning or is considered to be a term of art.

Here, the agreement between A & T Holdings and A & R Hospitality is an installment sales contract because it provides for the sale of assets and requires payment in installments. But it also has characteristics of a loan, where interest is paid for the temporary use of money.[38] A & T Holdings indirectly advanced money to A & R Hospitality so that it could take title to the assets. The fact that A & R Hospitality is obligated to repay the money renders it a loan within the meaning of the franchise agreement. Thus, the trial court clearly erred in finding that A & T

---

[33] *Moraine Products, Inc v Parke, Davis & Co*, 43 Mich App 210, 213; 203 NW2d 917 (1972), quoting 30 Am Jur 2d, Evidence, § 1075, pp 220-221. See also *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 210 Mich App 449, 452; 534 NW2d 160 (1995) (expert testimony to explain the technical meaning of "internal rate of return" in a mortgage note was admissible).

[34] *People v Lee*, 447 Mich 552, 558-559; 526 NW2d 882 (1994).

[35] *Blackwell Ford v Calhoun*, 219 Mich App 203, 210; 555 NW2d 856 (1996).

[36] *Lee*, *supra* at 562.

[37] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 532-533 n 5; 676 NW2d 616 (2004) (emphasis in original).

[38] *Lee*, *supra* at 558.

Holdings did not breach the noncompetition covenant in § 15.3 by making the loan. Therefore, we remand this case to the trial court for further proceedings consistent with our holding that the trial court clearly erred in finding that A & T Holdings did not make a loan within the meaning of § 15.3 of the franchise agreement.

III. Summary Disposition

A. Standard Of Review

Little Caesar argues that the trial court erred in granting A & R Hospitality's motion for summary disposition under MCR 2.116(C)(10), with respect to its claim that A & R Hospitality is bound by the settlement agreement. We review a trial court's summary disposition decision de novo.[39] A motion under MCR 2.116(C)(10) tests the factual support for a claim.[40] A court considers the pleadings, affidavits, depositions, admissions and other documentary evidence, to the extent that they would be admissible as evidence, in a light most favorable to the nonmoving party.[41]

> Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.[42]

B. Analysis

The express terms of the settlement agreement provide that it is binding on a successor, but that a "buyer of assets" is not a successor. Here, the sales agreement between A & T Holdings and A & R Hospitality established that A & R Hospitality was a buyer of assets. And Little Caesar has not established anything about the transaction between A & T Holdings and A & R Hospitality that gives rise to a reasonable inference that their separate corporate identities should be disregarded for purposes of imposing an affirmative duty on A & R Hospitality to comply with the noncompetition covenant in the settlement agreement. The fact of the matter is that A & T Holdings still exists and the evidence, viewed most favorably to Little Caesar, does not establish that A & T Holdings either owns or operates A & R Hospitality.

In general, separate corporate entities are respected in Michigan, unless doing so subverts the ends of justice.[43] And, here, we conclude that Little Caesar's alternative conspiracy theory,

---

[39] *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[40] *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007).

[41] *Id.* at 56.

[42] *West*, *supra* at 183.

[43] *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984).

based on A & R Hospitality being a vehicle through which A & T Holdings, R & K Holdings, and Jean and Robert Rooyakker could breach their obligations, is unavailing. A party opposing summary disposition must set forth specific facts showing a genuine issue of material fact for trial.[44] Here, the trial court determined that Little Caesar's claim lacked specificity and, based on our review of the record and Little Caesar's argument on appeal, we agree. Little Caesar has not demonstrated any relevancy of R & K Holdings to A & R Hospitality's purchase, or explained the specific duties that Jean and Robert Rooyakker, as distinguished from the corporate entities, are allegedly evading. In sum, there was no evidence of anything unlawful about A & R Hospitality being formed by Robert and Jean Rooyakker's son Matthew Rooyakker, in conjunction with his wife and Nicholas Aune, to purchase assets from A & T Holdings and operate them as Spicy Bob's restaurants.

IV. Conclusion

In summary, we conclude that the trial court erred in ordering a judgment of no cause of action because it erred (1) in considering the materiality of the Rooyakker defendants' breach; (2) in evaluating performance of the agreement's terms under a good-faith standard; (3) in finding that the appropriate consideration under the agreement was the primary or dominant items *available* in the restaurants, without considering actual sales activity; (4) in finding that the grinders were not sandwiches; and (5) in finding that A &T Holdings did not breach the noncompetition covenant in § 15.3 by making a loan to A & R Hospitality. But we conclude that the trial court did not err in granting summary disposition on the ground that A & R Hospitality was not bound by the settlement agreement.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[44] *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).